Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

No. 87-72

In The
Supreme Court of the United States
October Term, 1986

ROME RUTLEDGE,

Petitioner,

v.

RUTH RUTLEDGE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED

This Honorable Court should deny Petitioner's application for Writ of Certiorari because:

(1) The State Court judgment presents no substantial federal question.

(2) Petitioner's application for Writ of Certiorari was filed solely to delay the enforcement of the State Court's judgment.

LIST OF INTERESTED PARTIES

(1) Rome Rutledge, Petitioner
Wichita Falls, Texas

(2) Ruth Rutledge, Respondent
Iowa Park, Texas

(3) Crampton, Crampton & Estrada
505 Lamar Street
Wichita Falls, Texas 76301
Attorneys for Petitioner

(4) Banner, Dobbs & Briley
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STATEMENT OF THE CASE

This is a divorce case. On April 2, 1985, the trial court heard the case. A jury was expressly waived by both parties. On April 23, 1985, the County Court at Law for Wichita County, Texas, a Court created by Texas Statute, entered its decree granting a divorce and dividing the community property.

Petitioner appealed from such decree to the Court of Appeals for the Second Supreme Judicial District of Texas attacking the property division and the failure of the trial court to grant a new trial. Petitioner did not raise any issue concerning the trial court's jurisdiction. The Court of Appeals affirmed the trial court's decree.

Following the Court of Appeals affirmance, Petitioner filed a motion for rehearing which attacked the trial court's jurisdiction for the first time. Petitioner did not attack the jurisdiction of the trial court on the basis that it allowed juries to consist of six persons. The Court of Appeals denied this motion for rehearing. Petitioner then filed a second motion for rehearing and for the first time attacked the jurisdiction of the trial court on the basis that enabling legislation allowed for juries to consist of six persons. This second motion for rehearing was overruled by the Court of Appeals. Petitioner then filed a third motion for rehearing which was also denied.

Petitioner then filed an Application for Writ of Error to the Texas Supreme Court. The Texas Supreme Court refused to grant this Writ of Error noting "no reversible error."

———o———

REASON 1 WHY THE APPLICATION FOR CERTIORARI SHOULD BE DENIED

Restated

The State Court judgment presents no substantial federal question.

ARGUMENT UNDER #1

To grant certiorari in this case the Supreme Court must find that a substantial federal question exists. 28 U.S.C. 1257(3); Rule 17 of the Rules of the Supreme Court of the United States. If the State Court decided the case on non federal grounds, as here, this Court should not grant certiorari. Here, the Texas Courts decided this case by interpreting *Texas* law. By way of analogy, the Court of Appeals for the Second Supreme Judicial District of Texas cited United States Supreme Court cases that allowed federal juries to be composed of six persons in civil cases. However, the Texas Court of Appeals opinion did not cite such case as stare decisis but rather by analogy and authority.

Petitioner claims that Texas Constitution Article 5 Section 8 confers original exclusive jurisdiction over divorce cases upon its state district courts. This is not true. In *Jordan v. Crudgington*, 231 S.W. 2d 641 (Tex. 1950), the Texas Supreme Court held that the legislature may create statutory courts having jurisdiction over divorce cases without violating that constitutional provision.

Petitioner also claims the state constitution requires twelve person juries. The state constitution is silent as to what constitutes a jury. In 1950, the Texas Supreme

Court in *Jordan* held that a jury, as used in the Texas Constitution, consisted of twelve persons but cited no case authority for its holding. The Court of Appeals held that the Texas Constitution did not require twelve person juries in overruling Petitioner's second motion for rehearing. The Texas Supreme Court has apparently overruled *Jordan* when it refused Petitioner's Application for Writ of Error in this case. This holding is binding upon federal courts. See *Hortonville Dist. v. Hortonville Ed. Ass'n.*, 426 U. S. 482 (1976).

At any rate, Petitioner has not demonstrated in any manner how the State Court's refusal to hold that the trial court lacked jurisdiction on the basis of what constitutes a jury under the constitution has denied him due process. Such a claim is especially ludicrous given the fact that Petitioner waived a jury in this case. Furthermore, Petitioner has not demonstrated in any manner how he was denied equal protection by the refusal of the State Supreme Court to hold that the trial court lacked jurisdiction. He has not demonstrated that he belongs to any special class that was prejudiced by the trial court's ruling. In short, Petitioner simply makes a naked assertion that the Supreme Court's judgment violates the 14th Amendment to confer a federal aura on this case which only involves an interpretation of State Law. Petitioner's reliance upon *Wolff v. McDonnell*, 418 U.S. 539 (1974) and *Paul v. Davis*, 424 U.S. 693 (1976) is entirely misplaced. Both of those cases were actions arising under Federal Law, specifically 42 U.S.C. 1983. Here, Petitioner never raised any claim of federal involvement until after the Court of Appeals affirmed the trial court's property division.

REASON 2 WHY THE APPLICATION FOR CERTIORARI SHOULD BE DENIED

Restated

Petitioner's Application for Writ of Certiorari was filed solely to delay the enforcement of the State Court's judgment.

———o———

ARGUMENT UNDER #2

Petitioner *never* raised a jurisdictional objection at the trial level or on initial appeal. As an after thought, following the Texas Court of Appeals' affirmance of the trial court's granting a divorce and dividing community property, Petitioner, for the first time, raised jurisdictional attacks based on the "jury" issue, even though Petitioner had not requested a jury at the trial level and had affirmatively placed all questions of law and fact before the trial court, expressly waiving a jury. This jurisdictional attack was raised solely as a vehicle by which Petitioner could frivolously seek a review by this Court in an effort to delay compliance with the trial court's order, which obligated Petitioner to turn over certain items of community property.

Following the Texas Supreme Court's refusal to grant a Writ of Error in this case Respondent filed in the trial court a motion to compel Petitioner to comply with the specific terms of the divorce decree. In response to this motion Petitioner filed a Plea In Abatement claiming that the divorce decree was as yet unenforceable because Peti-

tioner intended to file an Application for Writ of Certiorari with this Court. Attached to that response is an affidavit by Petitioner's attorney, Holly Crampton, that states that Petitioner intended to seek a review of the case by the United States Supreme Court even before the case was submitted to the Texas Supreme Court! Thus, it is apparent that Petitioner is engaged in a war of attrition with his ex-wife seeking to delay until the very last moment of time his compliance with the trial court's decree. Further evidence of these dilatory tactics is shown by the fact that Petitioner filed three motions for rehearing in the Court of Appeals and one motion for rehearing in the Texas Supreme Court.

Petitioner's sole intent in filing this Application for Writ of Certiorari is to deprive Respondent of the property lawfully granted to her in the trial court's decree of divorce.

—o—

CONCLUSION

This is a controversy turning on the interpretation of Texas Law and does not involve any issue arising under the federal constitution. It is simply another effort by Petitioner to avoid the trial court's judgment. Respondent respectfully prays that the Application for Writ of Certiorari be and all things denied.

Respectfully submitted,

JACK BANNER
BANNER, DOBBS & BRILEY
1200 Hamilton Building
Wichita Falls, Texas 76301
(817) 723-6644

Attorneys for Respondent
Ruth Rutledge

APPENDIX

EXHIBIT A

NO. CCL-377-84

IN THE MATTER OF THE MARRIAGE OF	)	IN THE COUNTY COURT AT LAW
	)	OF
RUTH RUTLEDGE AND ROME RUTLEDGE	)	WICHITA COUNTY, TEXAS

MOTION FOR CONTEMPT, MOTION TO COMPEL EXECUTION OF DOCUMENTS AND MOTION FOR JUDGMENT FOR FAILURE TO DELIVER CERTAIN MONIES

(Filed April 23, 1987)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Ruth Rutledge, Movant, and requests the Court to enforce by contempt a prior order entered in this cause, order the Respondent to execute certain specific instruments and to grant a judgment in favor of Movant for the failure of Respondent to turn over certain monies as required by this Court's previous order and for such request would show the Court the following:

I. On April 23, 1985, this Court entered a final decree of divorce, which appears of record in Volume 11, Pages 1158 through 1247, of the minutes of this Court, that states in relevant part as follows:

It is ordered and decreed that Respondent, Rome Rutledge, shall appear in the law offices of Fillmore, Purtle

& Spurgers at Wichita Falls, Texas, at 2:00 P.M. on April 26, 1985, and shall execute, have acknowledged, and delivered to Petitioner, Ruth Rutledge, the following instruments:

1. A special warranty deed in the form attached to this Decree of Divorce as Exhibit 13 transferring Respondent's interest in the ranch at Iowa Park, Texas to Petitioner:
2. Assignments of overriding royalty interest in the form attached to this Decree of Divorce as Exhibits 14-18, transferring his interest in the royalty interest to Petitioner;
3. Certificates of Title to the following motor vehicles:
   a. 1983 Cadillac Eldorado
   b. 1980 Chevrolet pickup truck
   c. 1965 pickup truck
   d. 1978 4-wheel drive pickup
   e. Winch truck
4. A check drawn on the MBank Wichita Falls, N. A. account containing the approximately $225,000.00 that the Court has previously ordered Respondent to deposit in such account, in the amount of $60,500.00 payable to Ruth Rutledge.
5. Any and all other documents necessary to effect this decree.

Movant is Petitioner and Respondent is Respondent in the above described order.

II. Respondent has disobeyed the order as follows:

   a. Respondent failed to appear at the offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985, and

failed to execute the special warranty deed described as Exhibit 13 attached to the final decree of divorce;

b. Respondent failed to appear at the law offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985 and failed to execute the assignments of overriding royalty interest in the form attached to the decree of divorce as Exhibit 14-18 transferring Respondent's interest in the royalty interest to Petitioner;

c. Respondent failed to appear at the law offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985 and failed to execute the certificates of titles to the following motor vehicles:

1983 Cadillac Eldorado
1980 Chevrolet pickup truck
1965 pickup truck
1978 4-wheel drive pickup
Winch truck

d. Respondent failed to appear at the offices of Fillmore, Purtle & Spurgers at Wichita Falls, Texas at 2:00 P. M. on April 26, 1985 and failed to deliver a check in the amount of $60,500.00.

III. In its final decree of divorce this Court awarded movant the property described as Exhibit A attached to this motion.

The Court also ordered the Respondent to execute any and all other documents necessary to effect this decree. Attached to this motion and identified as Exhibit B are transfer orders required by Forest Oil Company, the company purchasing the oil from the oil lease described above, to transfer royalty payments to Movant. Movant requests

the Court to issue a clarifying order directing Respondent to execute the original of these documents within a reasonable time so that Movant may receive the royalty she is entitled. Movant further requests the Court to enter an order holding Respondent in contempt of Court if he refuses to execute such documents.

IV. In its final decree of divorce this Court awarded Movant the sum of $60,500.00 out of a specific account. Movant requests the Court to hold Respondent in civil and criminal contempt of Court for failing to deliver such amount as alleged above. Respondent requests the Court to order the Respondent to be confined in the county jail of Wichita County Texas for six months and for an additional period of time until Respondent purges himself of contempt by complying with the Court's previous orders.

V. In the event the Court feels that any of the above referenced orders contained in the final decree of divorce are not specific enough to be enforced by contempt, Movant requests the Court to enter a clarifying order directing the Respondent to execute the documents transferring Respondents interest in the property described in Exhibits 13 through 18 attached to the original decree of divorce, the certificates of titles to the motor vehicles described above and to order the Respondent to deliver the sum of $60,500.00 to Movant.

VI. Respondent, Rome Rutledge, has failed to pay $60,500.00 from the specific account of MBank Wichita Falls, N.A., as ordered by this Court. Petitioner seeks a judgement from this Court against Respondent pursuant to V.T.C.A. Family Code, Section 3.74, for the $60,500.00 plus pre-judgment interest and post judgment interest. Petitioner further requests the Court to rule that such

sum was held in trust or constructive trust for Petitioner's benefit. Petitioner further requests damages for the failure of Respondents to so deliver such monies.

VII. It was necessary to secure the services of Stephen Briley, a licensed attorney, to enforce and protect the rights of Movant and Respondent should be ordered to pay a reasonable attorney's fees, and a judgment plus interest should be rendered in favor of this attorney and against Respondent; or in the alternative such reasonable attorney's fees should be taxed as cost and ordered to be paid directly to the undersigned attorney.

VIII. Movant would show it is necessary to appoint an alternate process server. Prior motions to enforce the Court's decree have been placed with Mr. Mark Brewer constable in and for Wichita County, Texas. As shown by his affidavit attached hereto he has been unable to serve such motions. Movant requests the Court to appoint a disinterested adult to serve this motion.

PRAYER

Movant prays that the Court enter an order appointing an alternate method of service as requested herein and that Respondent be cited to appear herein. Movant prays that Respondent be held in contempt for disobedience of this Court's order as alleged herein and that punishment be fixed at a fine of not more than $500.00 or confinement in the county jail for not more than six months and continue thereafter until the Respondent complies with the order of the Court as alleged herein. Movant prays for

a money judgment as alleged and requested in this motion. Movant prays for attorney's fees as herein alleged.

Respectfully submitted,

BANNER, DOBBS & BRILEY
1200 Hamilton Building
Wichita Falls, Texas 76301
817/723-6644

BY: /s/ Stephen Briley
Stephen Briley
State Bar No. 02993600

THE STATE OF TEXAS
COUNTY OF WICHITA

The undersigned states under oath:

"I am Movant in the foregoing motion for contempt. I have personal knowledge of the facts and allegations stated in it and they are true and correct."

/s/ Ruth Rutledge
Ruth Rutledge, Affiant

THE STATE OF TEXAS
COUNTY OF WICHITA

SIGNED UNDER OATH BEFORE ME on the 22 day of April, 1987.

/s/ Marian S. Parks
Notary Public, State of Texas
My Commission Expires 1-24-89

SEAL

EXHIBIT B

NO. CCL-377-84

IN THE MATTER OF	)	IN THE COUNTY
THE MARRIAGE OF	)	COURT AT LAW
	)	OF
RUTH RUTLEDGE	)	WICHITA
AND	)	COUNTY,
ROME RUTLEDGE	)	TEXAS

PLEA IN ABATEMENT

(Filed May 14, 1987)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES Rome Rutledge by and through his attorney of record, and would show the Court that the Motion for Contempt, Motion to Compel Execution of Documents and Motion for Judgment for Failure to Deliver Certain Monies should be abated, and in support of this Plea would show the Court the following:

In 1983 the Texas Legislature enacted Subchapter D to Chapter 3 of the Texas Family Code. Specifically, subchapter D addresses the questions involving enforcement of divorce decree.

> § 3.71(a) provides that "Further orders may be entered to enforce the division, but these orders shall be limited to orders in aid of or in clarification of the prior order."
>
> § 3.71(c) states "The power of the court to enter further orders to aid or clarify the property division is abated during the pendency of *any* appellate proceedings." (emphasis ours)

While this case has completed the Texas appellate process, it is being appealed by Writ of Certiorari to the United States Supreme Court. The time period in which to petition for certiorari in a civil case is governed by Rule 20 of the Rules of the Supreme Court and 28 U.S.C. § 2101(c) which provides:

> (c) Any other appeal on any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. . . .

Because the Petition for Certiorari must be professionally printed and the form must be strictly adherred to, counsel for Rome Rutledge does not expect to be able to file the Petition for Certiorari before the end of May, 1987, which is a period of time significantly less than the 90 days given by law within which to file.

The decision to take this case to the United States Supreme Court if necessary was made in the summer of 1986 by Rome Rutledge and this counsel following the Opinion by the Court of Appeals being handed down.

The provisions of the family code § 3.71 are specific and control in matters involving enforcement of a divorce decree over general provisions of the law. § 3.71(c) is not limited to State court appellate proceedings, nor is a supercedeas bond require, nor is there any reference to whether the mandate has come down or not.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Rome Rutledge prays that the Court abate the said Motion for Contempt, Motion to Compel Execution and Documents

and Motion for Judgment for Failure to Deliver Certain Monies until the conclusion of the federal court appellate process.

Respectfully submitted,

CRAMPTON, CRAMPTON & ESTRADA

By: Holly Crampton
State Bar No. 05004500
505 Lamar
Wichita Falls, Texas 76301
(817) 723-9746

Attorneys for Rome Rutledge

STATE OF TEXAS)
)
COUNTY OF WICHITA)

BEFORE ME, the undersigned authority, on this day personally appeared Holly Crampton, who, being duly sworn, on her oath, deposed as follows:

My name is Holly Crampton, and I am the attorney of record for Rome Rutledge.

On April 8, 1987, the Supreme Court of Texas overruled Mr. Rutledge's Motion for Rehearing.

Mr. Rutledge and I agreed in the summer of 1986 to take this case to the United States Supreme Court if it was not overturned in the State appeals process.

We have preserved an important federal question to present to the United States Supreme Court arising out of the application of federal law to this case by the Court of Appeals which restricts the greater rights of Texas citizens specifically enunmerated in the Texas Constitution.

Our law firm expects to file Mr. Rutledge's Petition for Certiorari to the United States Supreme Court no later than Monday, June 1, 1987.

Further Affiant sayeth not.

/s/ Holly Crampton

SIGNED AND SUBSCRIBED BEFORE ME this 14th day of May, 1987.

/s/ Betsy Gurganus
Notary Public, State of Texas

My Commission Expires: 10-25-89

(SEAL)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Plea in Abatement was hand delivered to Mr. Stephen Briley, Banner, Dobbs & Briley, Suite 1200 Hamilton Building, Wichita Falls, Texas 76301, on this 14th day of May, 1987.

/s/ Holly Crampton